

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33130

<b>ZEHN A. CURTIS,</b>	)	<b>2009 Unpublished Opinion No. 408</b>
	)	
<b>Petitioner-Appellant,</b>	)	<b>Filed: April 3, 2009</b>
	)	
<b>v.</b>	)	<b>Stephen W. Kenyon, Clerk</b>
	)	
<b>STATE OF IDAHO,</b>	)	<b>THIS IS AN UNPUBLISHED</b>
	)	<b>OPINION AND SHALL NOT</b>
<b>Respondent.</b>	)	<b>BE CITED AS AUTHORITY</b>
	)	

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Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Peter D. McDermott, District Judge.

Appeal from district court order dismissing petition for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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GRATTON, Judge

Zehn A. Curtis appeals from the district court's summary dismissal of his petition for post-conviction relief. We affirm.

**I.**

**FACTS AND PROCEDURAL BACKGROUND**

Curtis was charged with rape, Idaho Code § 18-610(1), and sexual battery of a minor child sixteen or seventeen years of age under I.C. § 18-1508A(1)(c)(3). Pursuant to a plea agreement, Curtis pled guilty to the sexual battery charge and the State dismissed the rape charge. The district court imposed a unified term of fifteen years with a determinate term of five years. Curtis filed a Rule 35 motion for reduction of sentence which was denied by the district court. Curtis appealed on the grounds that his sentence was excessive and that the district court abused its discretion in denying his Rule 35 motion. This Court affirmed Curtis' sentence and denial of the Rule 35 motion. *State v. Curtis*, Docket No. 30144 (Ct. App. 2004) (unpublished).

Curtis filed a pro se petition for post-conviction relief alleging a variety of claims, including: (1) failure to provide for an updated psychosexual evaluation prior to sentencing; (2) several claims of ineffective assistance of counsel; (3) conflict with appointed counsel; (4) request for an attorney during questioning by the police which was denied; (5) the judge engaged in vouching; (6) he was denied his right to self-representation; and (7) another party was culpable for the offense. The court granted Curtis' motion for appointment of counsel. The State filed a motion for summary dismissal. After a hearing, the court entered an order granting summary dismissal as to the ineffective assistance of counsel claims. The court denied summary dismissal on the claim regarding the lack of a current psychosexual evaluation, ordered a psychosexual evaluation and scheduled resentencing after its completion. The order did not specifically address the remaining claims. After receiving the psychosexual evaluation, the district court re-imposed the previous sentence. Curtis filed this appeal.

During the appeal process, the State moved to remand in order to obtain clarification from the district court regarding disposition of the remaining claims. On remand, the district court entered an order dismissing the remaining claims. Upon realizing that notice of the order was not sent to Curtis or his counsel, the district court sent a notice of intent to dismiss and conducted a hearing. At the hearing the court dismissed the remaining claims.

## II. ANALYSIS

The sole issue presented on appeal is whether the district court erred by summarily dismissing the claim that Curtis was denied counsel during a police interrogation. Curtis asserts that the evidence submitted was sufficient to raise a genuine issue of material fact precluding summary dismissal. The State argues that Curtis' claim that he was denied counsel during police questioning (1) was unsupported by evidence; (2) could and should have been raised on direct appeal; and (3) was affirmatively disproven by the record. As set forth below, we agree with the district court's determination that the evidence presented was insufficient to raise a genuine issue of material fact and, therefore, we need not address the remaining arguments advanced by the State.

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct.

App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than “a short and plain statement of the claim” that would suffice for a complaint under Idaho Rules of Civil Procedure. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court’s own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant’s evidence has raised no genuine issue of material fact that, if resolved in the applicant’s favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the State does not controvert the applicant’s evidence because the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the Court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). A claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 if the applicant has not presented evidence making

a *prima facie* case as to each essential element of the claim upon which the applicant bears the burden of proof. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998).

When a person undergoing custodial interrogation invokes his right to counsel, the police must stop the questioning and they may not continue it until the individual reinitiates the dialogue or an attorney is made available. In either event, a statement made in the absence of counsel will be admissible in evidence only if it is the product of a voluntary, knowing and intelligent waiver of the previously invoked right to have counsel present. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *Miranda v. Arizona*, 384 U.S. 436 (1966); *State v. Blevins*, 108 Idaho 239, 242 P.2d 1253, 1256 (Ct. App. 1985). A constitutional violation based on invocation of right to counsel during police interrogation must be established through proof that the defendant was subject to custodial interrogation, that he requested counsel, and that questioning continued without counsel despite his request. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *State v. Cheatham*, 134 Idaho 565, 574, 6 P.3d 815, 824 (2000). In the context of post-conviction relief, the applicant bears the burden not only to prove a constitutional violation, but also to demonstrate that he suffered some resulting prejudice that would entitle him to relief. *Parra v. State*, 129 Idaho 950, 952, 935 P.2d 213, 215 (Ct. App. 1997).

In Curtis' affidavit accompanying his petition for post-conviction relief, he states: "That affiant asked for legal representation during questioning by the police which he was denied." Curtis provided no further evidence regarding this claim at or before either the first hearing or the hearing conducted upon remand during the instant appeal. As noted, the State moved for summary dismissal. The district court entered an order dismissing the remaining claims. The court held that "the Petitioner does not provide supporting evidence of his allegation that he was denied his right to counsel during police questioning." Upon realizing that notice of the order was not sent to Curtis or his counsel, the district court sent a notice of intent to dismiss and conducted a hearing. At the hearing the court dismissed the remaining claims, indicating that the court was adhering to the previously issued order, stating: "There are no genuine issues of material fact here, and the allegations have not been supported by evidence that would require setting an evidentiary hearing."<sup>1</sup>

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<sup>1</sup> Curtis claims that the district court applied the wrong standard of review because the court's written decision stated, "Mr. Curtis has not proven this allegation by a preponderance of

Curtis argues that he did submit evidence in support of the claim. He argues that the statement “that affiant asked for legal representation during questioning by the police which he was denied,” is evidence supporting the claim. We agree that, as far as it goes, this statement is apparently made based upon personal knowledge and in a sworn affidavit. Curtis’ statement could be said to create genuine issues of material fact as to the facts which it states. However, that statement, even taken as true, neither alleges nor provides evidence regarding the necessary elements of a *prima facie* case to demonstrate a violation of his right to counsel during custodial police interrogation. Curtis’ affidavit fails to allege facts and provide evidence that: (1) he was in a custodial situation at the time of the police questioning; (2) questioning continued after he asked for an attorney; and (3) statements were taken in violation of his rights which would have been subject to suppression, were admitted as evidence or used against him in any manner. Curtis’ petition and affidavit fail to allege or provide evidence to support the elements of a *prima facie* case of the constitutional violation. Therefore, the district court correctly determined that Curtis failed to submit evidence necessary to support the claim and create genuine issues of material fact warranting an evidentiary hearing.

### **III.**

#### **CONCLUSION**

Curtis failed to submit evidence necessary to support a claim for post-conviction relief on the ground that he was denied counsel during a custodial police interrogation and was prejudiced thereby. The order of the district court denying post-conviction relief is affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**

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the evidence.” However, at the subsequent hearing the court applied the correct standard when it held that, “there are no genuine issues of material fact.”